

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

VS.

RAY V. HERNANDEZ,
Defendant.

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C.A. NO. C-07-186

**AMENDED MEMORANDUM OPINION AND ORDER GRANTING MOTION
FOR SUBSTITUTED SERVICE AND ORDER GRANTING MOTION FOR
ENTRY OF *NUNC PRO TUNC* ORDER**

Plaintiff United States of America seeks recovery from defendant for defaulting on three student loans guaranteed by the Department of Education (D.E. 1). Pending is the United States' motion for substituted service (D.E. 4). Plaintiff has shown it is entitled to substituted service, and the motion (D.E. 4) is granted.

Applicable Law

The Federal Rules of Civil Procedure provide for service, including substitute service, upon individuals within the judicial district as follows:

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

FED. R. CIV. P. 4(e)(2). According to the affidavit provided by the process server in this case, personal and substitute service were attempted but not successful, because no response was received to several delivery notices left at the residence (D.E. 4, Exh. 1).

The Federal Rules of Civil Procedure also permit service of process within the Southern District of Texas in any manner allowed by Texas law. FED. R. CIV. P. 4(e)(1). The Texas rule directs service upon individuals as follows:

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

TEX. R. CIV. P. 106(a). Substituted service is allowed only by court order after unsuccessful attempts at service pursuant to the rule:

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

TEX. R. CIV. P. 106(b)(1). In this case, the process server submitted an affidavit stating under oath that he attempted personal service on eight occasions by leaving delivery notices at the address on the summons and sending mail notifications (D.E. 4, Exh. 1). He confirmed that

the defendant lives at the address on the summons, and that he receives mail at that same address (Id.). Service pursuant to TEX. R. CIV. P. 106(a)(1) was attempted at the address in the affidavit and on the summons, but was not successful. Plaintiff is requesting that it be allowed, pursuant to TEX. R. CIV. P. 106(b(2) to mail the summons and complaint via first class mail and to attach the summons and complaint to the front entrance of the home located at the address in the affidavit.

Plaintiff has met its burden of demonstrating that personal service was attempted but failed, and that reasonably effective notice of this suit can be given via substituted service. Plaintiff is granted permission to serve the summons and complaint by mailing a copy of the summons and complaint to the address in the affidavit via first class mail, postage prepaid, and by (1) securely posting the summons and complaint to the front entrance of the Hernandez's usual place of abode at 408 N. Polk, Beeville, Texas 78102, or (2) by leaving it with someone 21 years of age or older home located at the address in the affidavit.

Plaintiff's motion for entry of *nunc pro tunc* order (D.E. 6) is granted. This amended order is effective as of September 26, 2007.

ORDERED this 6th day of December, 2007.


B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE